No. 04-10819-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RICHARD LEVINE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff-Appellant

v.

BELLSOUTH CORPORATION
Defendant-Appellee

On Appeal From Judgment of the United States District Court for the Southern District of Florida

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BRIEF OF *AMICI CURIAE* AT&T CORP. AND THE COMPTEL/ASCENT ALLIANCE IN SUPPORT OF PLAINTIFF-APPELLANT

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April 16, 2004

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The CompTel/ASCENT Alliance ("CompTel") is a national trade association representing providers of telecommunications services. CompTel, pursuant to Rule 26.1 of the Federal Rules of Appellate procedure and Rule 26.1-1-3 of this Court, certifies that it has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public. AT&T Corp. ("AT&T") is, among other things, a provider of competitive local telecommunications services. AT&T, pursuant to Rule 26.1 of the Federal Rules of Appellate procedure and Rule 26.1-1-3 of this Court, certifies that it has no parent company and that no publicly held company owns 10 percent or more of AT&T's stock.

AT&T and CompTel (collectively "*Amici*") further certify that the following is a list of the trial judge, and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case:

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INTEREST OF AMICI

The CompTel/ASCENT Alliance ("CompTel") is a national trade association representing providers of telecommunications services. AT&T Corp. ("AT&T") is, among other things, a provider of competitive local telecommunications services. AT&T and CompTel (collectively "*Amici*") provide a national perspective on the role that the antitrust laws should play in ensuring that local telephone competition becomes a reality. As such, this brief supports and supplements that of the individual Plaintiff and will assist the Court in reviewing the district court's decision.[1]

This case is of critical importance. *Amici* have been working to bring consumers local telephone choice and innovation in markets that have long been monopolized by Appellee BellSouth Corporation ("BellSouth") and other incumbent local exchange carriers. BellSouth has responded to this threat of competition by engaging in an anticompetitive campaign to preserve its dominant position, thereby unlawfully monopolizing local telephone markets. This case involves one of BellSouth's most effective tactics for foreclosing local competition: punishing customers that would switch to another provider for local telephone service by refusing to continue to sell them high-speed Internet access services (known as

[1] Counsel for Appellant and Appellee have consented to the filing of this brief.

"DSL services"). In dismissing Plaintiff's Second Amended Complaint on a Rule 12 motion, the district court effectively immunized BellSouth's anticompetitive practices from the antitrust laws.

This ruling is clearly erroneous and would, if followed, have far-reaching negative consequences for local telephone competition and consumer welfare. BellSouth has over a million DSL customers and its practices impede, if not foreclose altogether, the ability of carriers to provide local voice services to those customers. BellSouth's practices likewise threaten the viability of next generation voice-over-Internet protocol ("VoIP") telephone services that require a broadband connection such as DSL.

STATEMENT OF ISSUES

Whether the district court properly dismissed Plaintiff's Second Amended Complaint against BellSouth on the grounds that Plaintiff had failed to state a claim for monopolization under section 2 of the Sherman Act.

STATEMENT OF THE CASE

This case involves an antitrust lawsuit brought by an individual against BellSouth Corporation ("BellSouth") that has potentially far-ranging consequences for competition in the local telephone markets that BellSouth dominates. BellSouth refuses to sell high-speed Internet access service (called digital subscriber line or "DSL" service) to existing customers that wish to choose another carrier for local voice telephone service. This practice maintains and enhances BellSouth's local telephone monopolies because many of BellSouth's existing DSL customers are unwilling – or unable – to switch broadband Internet access service providers as a condition of obtaining voice services from a competitive provider.

BellSouth is one of the regional Bell operating companies ("BOCs") that "inherited" the Bell System local telephone monopoly. *United States* v. *Western Elec. Co.*, 900 F.2d 283, 289 (D.C. Cir. 1990). Until 1984, the local telephone networks that served over 80% of the nation were owned and operated by the former Bell System, which included BellSouth and the other BOCs, AT&T, Western Electric, and Bell Telephone Laboratories. BOCs were the monopoly providers of all local services that their customers used; long distance services were provided to the BOCs' customers by AT&T. Bell Telephone Laboratories engineered the BOCs' networks and designed the equipment they used, and Western Electric manufactured virtually all of their equipment.

Until the 1960s competition against the Bell System was largely precluded by law. In the late 1960s, however, the Federal Communications Commission ("FCC") began an effort to introduce competition into long distance service (and telecommunications equipment) – while continuing to treat local service as a natural monopoly.[2] The FCC's efforts proved ineffective. The local networks were so complex and dynamic that the BOCs had the virtually uncontrollable ability to use their local monopolies to assure that competitors could not effectively compete with whatever long distance services the BOCs offered. *See United States* v. *AT&T*, 524 F. Supp. 1331 (D.D.C. 1982); *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983).

In light of the ineffectiveness of the FCC's attempts to open long distance and manufacturing markets to competition, rival companies brought a series of antitrust suits against the Bell System.[3] Ultimately, these private parties were joined by the government, which became convinced that meaningful long distance competition was not possible so long as the BOCs controlled the last-mile facilities necessary to

[2] *See, e.g.*, *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971), *aff'd sub nom.*, *Washington Utils. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975); *MCI Telecomms.* v. *FCC*, 580 F.2d 590 (D.C. Cir. 1978).

[3] *See, e.g.*, *MCI Communications Corp.* v. *AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983); *Litton Sys.* v. *AT&T Co.*, 700 F.2d 785, 807 (2d Cir. 1983); *Mid-Texas Communications* v. *AT&T Co.*, 615 F.2d 1372, 1377-82 (5th Cir. 1980).

place and receive telephone calls. The government's antitrust suit was eventually settled in a consent decree (the "MFJ"). To assure that BOCs could not use their local monopolies to foreclose effective and free competition in long distance services, the MFJ required (1) that the Bell System be split between the local monopolies (assigned to seven divested BOCs) and the long distance businesses (assigned to the post-divestiture AT&T) and (2) that each divested BOC be prohibited from providing long distance services in its region until such time as it lost "the ability to leverage [its] monopoly power into the competitive [long distance] markets." *AT&T*, 552 F. Supp. at 194, *aff'd*, 460 U.S. 1001.

After the MFJ was implemented, competition in long distance services flourished, for BOCs had lost any incentive to favor any one long distance carrier in providing access to local monopoly networks and all long distance carriers competed on the same level playing field. Within a relatively few years, numerous other carriers were offering the same range of services as AT&T, and long distance prices dropped substantially. *See AT&T Non-Dominance Order*, 11 FCC Rcd. 3271 (1995).

However, the MFJ did nothing to eliminate the BOCs' local telephone monopolies, and state law continued to protect the BOCs from local competition. H.R. Rep. No. 104-204, 49 (1995). In light of the enormous consumer benefits that flowed from competitive long distance and telephone equipment manufacturing markets that developed after the MFJ, Congress, in the Telecommunications Act of 1996 ("1996 Act"), amended the Communications Act with the aim of opening "all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, 1 (1996). In section 253 of the 1996 Act, Congress preempted state laws that protected the BOCs and other incumbent monopolists ("incumbent LECs") from local competition, including laws that required or permitted incumbents to deny competitors access to their ubiquitous networks. 47 U.S.C. § 253.

Congress recognized, however, that simply eliminating legal barriers to entry was inadequate. Congress also took steps to address the enormous economic entry barriers created by the incumbent LECs' ubiquitous, ratepayer-funded local networks that, at least in the near term, would be impossible for new entrants to duplicate. *See, e.g.*, *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 490 (2002). In section 251(c) of the 1996 Act, Congress expressly directed incumbent LECs to "interconnect" with competitors' networks, to lease to competitors piece-parts of incumbents' networks (called "unbundled network elements" or "UNEs") and to allow competitors to place equipment necessary for interconnection or access to network elements in the incumbents' premises ("collocation"). 47 U.S.C. § 251(c). Congress hoped that competitors would then be able to combine their own and incumbent LEC facilities to provide retail services in competition with incumbents. Congress also mandated that incumbent LECs allow competitors to "resell" their local services at a discount (to reflect the costs the incumbents avoid by not having to market their services at retail). *Id.* § 251(c)(4). BOCs that complied with these and the other market-opening obligations of the 1996 Act were permitted to re-enter the long distance markets from which they were barred since the MFJ. *Id.* § 271.

In light of the proven failure of regulation alone to protect competition and prevent BOC market power abuses, Congress also made absolutely clear that the BOCs and other local monopolists would remain liable for antitrust violations. Section 601(b) of the 1996 Act states: "[n]othing in this Act or amendments made by this Act shall be construed to modify, impair, or supersede the applicability of the antitrust laws." Pub. L. 104-104, 110 Stat. 143 (1996) (reprinted as note to 47 U.S.C. § 152). Section 601(c), entitled "NO IMPLIED EFFECT," further directs that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local laws unless expressly provided in such Act or amendments." *Id.* *See also* President's Statement Upon Signing § 652, *reprinted in* 1996 U.S.C.C.A.N. 228-3 (savings clause "ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemakings or orders, the antitrust laws continue to apply fully"). As the Supreme Court subsequently held in *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, the 1996 Act's savings clause "bars a finding of implied [antitrust] immunity" and "preserves claims that satisfy existing antitrust standards." 124 S. Ct. 872, 878 (2004).

As contemplated by the 1996 Act, competitors use a number of means to provide local telephone services. They provide services entirely over their own local networks, lease UNEs from incumbents and combine them with their own local network equipment, and/or resell the incumbent's retail services. And most recently, competitive carriers have begun offering local telephone services using the Internet. These voice-over-Internet-protocol ("VoIP") services require a high-speed Internet connection, but allow customers to drop their traditional "wireline" local telephone service altogether. *See IP-Enabled Services Notice*, WC Docket 04-36, 2004 WL 439260, ¶ 3 (Mar. 10, 2004). This growing competition in turn has forced the BOCs to lower rates and match competitors' innovative new service packages.[4]

The BOCs know, however, that this competition is nascent and fragile. Thus, they have developed new strategies to thwart this emerging competition and maintain their local monopolies. This case involves one of most effective anticompetitive strategies that the BOCs have developed – punishing customers that would choose to receive voice service from a rival.

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[4] *See, e.g.*, Kevin Hassett, Zoya Ivanova & Laurence Kotlikoff, *Increased Investment, Lower Prices – the Fruits of Past and Future Telecom Competition* (2003) (available at http://econ.bu.edu/kotlikoff/HIK%209-16-03.pdf).

Specifically, in addition to being the dominant provider of local voice services in its territory, BellSouth is also the dominant provider of DSL service. DSL service provides Internet access at much higher speeds than traditional "dial-up" service. DSL service is provided over the same copper bottleneck loops used to provide voice service, but utilizes the high frequency portion of the local loop (whereas voice services and "dial up" Internet access utilize the low frequency portion of the local loop).

Although DSL service is today primarily used for Internet access, it is also increasingly used for *voice* service. As a result of technological changes, DSL and other broadband services can support "voice-over-Internet Protocol" or "VoIP." *See IP Enabled Services Notice*, 2004 WL 439260, ¶ 3. VoIP allows users to send and receive voice calls, but without using the traditional telephone network. *Id.* ¶ 37. Thus, consumers are increasingly using DSL to access the Internet *and* handle their local and long distance calls and are canceling their traditional local phone service.[5]

[5] *See IP-Enabled Services Notice*, 2004 WL 439260, ¶¶ 10-22; 4/13/04 Communications Daily ("growth potential for [VoIP] competitors in 2004 and beyond could be significant" and "loss of the [local] lines to the competitors, would result in a loss to the RBOCs of around $5 billion in residential revenues"); 3/29/04 Communications Daily, *Copps Welcomes Powell's Articulation of Internet Freedom, Wants More Action* ("VoIP likely will make traditional phone service obsolete" and "ILECs look at VoIP 'and are terrified' because they'll have to (continued . . .)

Having invested heavily to upgrade its local network to provide DSL service, *see* BellSouth 2003 Annual Report at 30, BellSouth would ordinarily have a strong incentive to attract as many DSL subscribers as possible. BellSouth refuses, however, to sell DSL service to customers, including *existing* DSL customers, that wish to obtain local voice service from a competitor that provides local service by leasing access to BellSouth's network pursuant to section 251(c)(3) of the 1996 Act.[6]

As alleged in the Second Amended Complaint (¶¶ 46-47), this has a devastating impact on competition. In many locations customers cannot obtain broadband Internet access service except from BellSouth. *Id.* ¶ 37. If these customers want to continue to receive broadband Internet access service, BellSouth's practices foreclose competition for these customers altogether. Further, even where viable alternatives exist, many customers are unwilling to change broadband providers because of the high "switching costs." *Id.* ¶ 40. Many broadband customers are simply unwilling to endure the headaches attendant to

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(. . . continued)
compete").

[6] Notably, as described below, BellSouth provides "standalone" DSL service when a competitive carrier "resells" BellSouth's local voice services under section 251(c)(4) of the 1996 Act.

changing broadband service providers – such as the difficulties of ordering, installing and trouble-shooting the new service, having to obtain a new e-mail address and providing that address to the customer's contacts, and going without service until the new service is installed.

The Florida Public Service Commission and other state commissions have already condemned BellSouth's practice as anticompetitive. In each case, the regulatory commission found that BellSouth's practice "prevents [competitive carriers] from being treated fairly by erecting barriers to [local telephone] competition" and "impedes competition by limiting the range of consumer choice."[7] BellSouth, however, has stated that it will not comply with these decisions and is actively seeking to have them overturned.[8] BellSouth has also filed a petition with the FCC asking that agency to preempt these state regulatory commission decisions

[7] *Competitive Carriers Association Complaint*, Docket No. 020507-TL, at 20 (Fla. PSC Nov. 20, 2003) ("*Florida PSC Staff Recommendation*"); *see also MCI WorldCom Arbitration Petition*, Docket No. 11901-U, at 16 (Ga. PSC Oct. 21, 2003) ("*Georgia PSC Order*"); *Cinergy Communications Co. Arbitration Petition*, Case No. 2001-00432, at 7 (Ky. PSC July 12, 2002), *aff'd, BellSouth Telecomms., Inc.* v. *Cinergy Communications Co.*, 297 F. Supp. 2d 946 (E.D. Ky. 2003); *FDN, Inc. Arbitration Petition*, Order No. PSC-02-0765-FOF-TP, at 10, 11 (Fla. PSC June 5, 2002); *BellSouth's provision of ADSL Service to End-users over CLEC loops*, Order R-26173, at 5 (La. PSC Jan. 24, 2003) ("*Louisiana PSC Order*").

[8] *See* Medley Global Advisors, Equity Brief, *BellSouth: DSL/Voice Bundling Faces Regulatory Obstacles*, at 3 (Jan. 14, 2004) ("Medley Global Advisors") ("BellSouth lobbyists say they will not comply with the state orders" until ordered to do so by the FCC).

as beyond the state commission's authority to regulate local telephone services. *See generally BellSouth Emergency Request*, WC Docket 03-251 (Dec. 9, 2003). Thus, BellSouth continues this practice today.

Plaintiff is a victim of this practice. After he attempted to switch to a lower-priced rival for local voice service, BellSouth informed Plaintiff that it would cancel his DSL service if he switched voice providers. Second Am. Compl. ¶ 48. In his Second Amended Complaint, Plaintiff challenged BellSouth's conduct as violating section 2 of the Sherman Act. The Second Amended Complaint alleged both that BellSouth had market power in the local voice market and that BellSouth's conduct maintained that market power through anticompetitive means. *Id.* ¶¶ 70-73.

The district court dismissed these claims under Rule 12. The district court concluded that Plaintiff's claim was premised on the notion that BellSouth violated the antitrust laws, not by punishing its customers who sought voice service from a competitor, but by refusing to "cooperate with rivals" in ways that do not violate the antitrust laws. *Levine* v. *BellSouth Corp.*, 302 F. Supp. 2d 1358, 1371 & n.9 (S.D. Fla. 2004).

SUMMARY OF ARGUMENT

This case is critically important to future telecommunications competition. In the 1996 Act, Congress amended the Communications Act to "accelerate rapidly" the opening of "all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996). Congress did not rely solely on regulatory means to pry open local telephone markets. It also adopted a sweeping savings clause to ensure that antitrust laws would continue to play their well-established role in combating systemic and pervasive anticompetitive conduct by telephone monopolists.

Frustrated by BellSouth's predatory abuses that prevented him from choosing the local voice carrier that offered service at a lower price, Plaintiff sought to rely on antitrust law precisely as Congress intended. The district court, however, held that, *as a matter of law*, Plaintiff failed to state an antitrust claim because his claim rested on the theory that BellSouth must "cooperate" with rivals. The gravamen of Plaintiff's complaint is not that BellSouth is required to cooperate with rival voice providers, however, but that BellSouth has punished DSL *customers* that wish to use a rival for voice service by refusing to sell those customers DSL services that they currently purchase from BellSouth. For over 50 years, Courts have held that such conduct by a monopolist violates section 2 of the Sherman Act. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 147-49 (1951). Indeed, given that Plaintiff is an existing BellSouth DSL customer that is willing to pay BellSouth's *full retail price* for keeping that service, BellSouth's willingness "to sacrifice short-run benefits and consumer goodwill" can only be rational because of its "perceived long-run impact on its smaller rival." *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985). This is the paradigm of exclusionary conduct that violates section 2 of the Sherman Act.

Amici and others have been working for years to bring consumers the local telephone choice and innovation contemplated by the 1996 Act. BellSouth and other incumbent LECs have responded with anticompetitive campaigns designed to stamp out this nascent competition before it can ever take root. If the district court's decision is allowed to stand, BellSouth and other incumbent LECs will effectively be granted the very immunity from antitrust liability that Congress expressly denied them. Significant local telephone competition may not develop if that view prevails.

The district court's ruling is particularly problematic because of the potential impact it would have on next generation VoIP services that promise enormous consumer benefits. *See IP-Enabled Services Notice*, 2004 WL 439260, ¶ 3 (2004). As noted, certain VoIP services allow a customer to send and receive voice calls over the Internet, but require a high-speed Internet connection such as DSL. With recent improvements in the quality of VoIP service, customers would have the option of dropping their traditional "wireline" local telephone service from

BellSouth and instead using their DSL connection for both Internet access and voice service. This threatens to reduce substantially the enormous profits that BellSouth earns from its monopoly local voice services. *See supra* n.5. BellSouth, however, can deter such defections by refusing to sell customers DSL service should they drop their BellSouth local voice telephone service. And under the district court's ruling, such action would face no antitrust scrutiny despite threatening to foreclose the emergence of this important new technology that promises enormous consumer benefits.

The decision below should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S SHERMAN ACT CLAIMS.

The district court purported to follow the Supreme Court's decision in *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004), in dismissing Plaintiff's Second Amended Complaint. In *Trinko*, however, the Supreme Court confirmed that the 1996 Act's savings clause means what it says: the savings clause "bars a finding of implied [antitrust] immunity." *Id.* at 878. Thus, "the 1996 Act preserves claims that satisfy existing antitrust standards." *Id.*

As explained below, the Second Amended Complaint clearly pleads a violation of "existing antitrust standards." The Second Amended Complaint alleges all the elements of a monopolization claim. Indeed, the Second Amended Complaint pleads a textbook violation of the antitrust laws: that BellSouth has punished customers that want to switch to another carrier for local voice services by engaging in conduct that makes no economic sense apart from its impact on competition. And contrary to the district court's holding, the precedents so holding were neither disturbed by the Supreme Court in *Trinko* nor negated by the FCC's failure to require as a regulatory obligation that BellSouth grant rivals the right to "unbundled" access to the "low frequency" portion of local loops that would allow them to lease only a portion of the local loop to provide voice services, reserving the "high frequency" portion of the loop to BellSouth to provide DSL service.

A. The Second Amended Complaint Alleges A Textbook Violation Of Section 2 Of The Sherman Act.

The Second Amended Complaint alleges facts that, taken as true, establish the two elements of a monopoly-maintenance claim under section 2 of the Sherman Act: (1) monopoly power, and (2) exclusionary conduct used to maintain it. *See Eastman Kodak Co.* v. *Image Tech. Servs.*, 504 U.S. 451, 482-83 (1992). The Second Amended Complaint alleges that, "[i]n areas where BellSouth is the ILEC, its share of the market for the provision of local telephone service is approximately 85%." Second Am. Compl. ¶ 43. That allegation is more than sufficient to state a claim of monopoly power. *See, e.g., Eastman Kodak*, 504 U.S. at 481 (monopoly power may be inferred from 80% market share).

The Second Amended Complaint also properly alleges exclusionary conduct. Conduct is exclusionary (i) when the conduct has an "anticompetitive effect" – *i.e.*, it "harm[s] the competitive *process* and thereby harm[s] consumers" and (ii) where "the anticompetitive harm of the conduct outweighs [any] procompetitive benefit." *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58, 59 (D.C. Cir. 2001) (*en banc*). Here, the Second Amended Complaint alleges facts sufficient to establish that the conduct is exclusionary. The Second Amended Complaint alleges that BellSouth has adopted a policy that has no legitimate business justification. *See* Second Am. Compl. ¶¶ 13-16, 49. Pursuant to that policy, when voice customers leave BellSouth for a voice-service competitor, BellSouth *punishes* them by cutting off their DSL service. *See id.* ¶ 45 ("BellSouth refuses to make its DSL service available to customers and potential customers who purchase their local telephone service from CLECs."). This deters customers from changing voice service providers because many DSL users do not also want to switch to another high-speed Internet access provider solely to change voice service.

There are two basic reasons why this is so. First, even where alternative broadband services are offered (principally broadband Internet access offered by cable companies), many existing BellSouth DSL subscribers are effectively locked into BellSouth service. As alleged in the Second Amended Complaint – and as found by the state commissions – the costs of switching broadband providers is so high that many customers reluctantly would forego the opportunity to use a lower priced voice carrier if doing so would cause them to lose their existing BellSouth DSL service. *See id.* ¶ 40.

This is spelled out in detail in the Second Amended Complaint and the state commission orders that have enjoined BellSouth's practice. As anyone who has purchased DSL or cable modem service is well aware, there are significant set-up costs for broadband service: most DSL subscribers will want to avoid the time and effort needed to install a new service and iron out the bugs. *See* Second Am. Compl. ¶ 40; *Florida PSC Staff Recommendation*, No. 020507-TL, at 23. In addition, when a subscriber loses his BellSouth DSL account, he also typically loses his e-mail address, which leads to inconvenience and confusion. *See Georgia PSC Order*, No. 11901-U, at 16-17. For example, a small business subscriber would have to send a change of email address to all of his email contacts to inform them that his address had changed. Similarly, a person that sells merchandise on eBay would need to update her profile and inform all prior purchasers of her new e-mail address. Finally, switching broadband providers (where possible) can still leave a temporary gap in coverage, and require a subscriber to re-establish formats, support, and passwords for web pages and Internet-provider services. *See* Second Am. Compl. ¶ 40; *Florida PSC Staff Recommendation*, No. 020507-TL, at 23.

Second, as alleged in the Second Amended Complaint, in many areas in BellSouth's territories there are no alternative broadband providers to BellSouth's DSL service. Second Am. Compl. ¶ 37.[9] In these instances, the only way in which

[9] These allegations are confirmed by the findings of the FCC and state regulators. *See* High-Speed Services for Internet Access, Industry Analysis and Technology Division, F.C.C. Wireline Competition Bureau (Dec. 2003) (available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD /hspd1203.pdf); *Georgia PSC Order*, No. 11901-U, at 7-8, 17.

a customer can obtain broadband Internet access is to purchase BellSouth DSL service.

Thus, by threatening to disconnect customers from their DSL service, BellSouth plainly makes it less likely that those customers will leave their BellSouth voice service for a rival. And although not required, the Second Amended Complaint alleges that BellSouth's policies have, *in fact*, entrenched BellSouth's monopoly because many customers have refused to purchase voice services from competitive carriers that they would otherwise wish to purchase because they would lose their DSL service as a result. Second Am. Compl. ¶ 46. This commonsense economic reality is so indisputable that even BellSouth concedes it. *See* Medley Global Advisors, *supra* at 13 n.8, at 3 (quoting senior BellSouth representative as stating "[e]ssentially, it's a huge disincentive for customers to use a [competitive carrier] for voice if they are not able to use our DSL service").

It is further clear that BellSouth's conduct does nothing to benefit consumers. BellSouth's turning off the DSL faucet is in no way intended to promote its efficiency; it is entirely gratuitous. It is much like the conduct of the Bell System, which, when customers left it for a rival, would vandalize their premises — conduct that impaired competition without even the pretense of an efficiency enhancing justification. *See Litton Systems, Inc.* v. *AT&T Co.*, 700 F.2d 785, 802, 815 (2d Cir. 1983) (upholding section 2 liability where maker of "PBX" telephone switches would punish customers for switching to rival switch makers by gratuitously cutting off their telephone wires flush with the wall).

That the challenged BellSouth practice constitutes exclusionary conduct for purposes of section 2 not only follows from first principles, but also is supported by specific Supreme Court precedent: the precise conduct of which BellSouth stands accused — inflicting gratuitous punishment upon defecting customers — was held to be unlawful by the Supreme Court in *Lorain Journal*. 342 U.S. at 147-49. Specifically, the Supreme Court there held that a monopolist newspaper engaged in exclusionary conduct when it refused to sell any more advertising to merchants who had bought even a small amount of advertising from a competing radio station. *Id.* Following *Lorain Journal*, courts have held that where "a monopolist refuses to deal with customers who deal with its rivals," such "behavior is inherently anticompetitive [and] . . . is illegal." *Byars* v. *Bluff City News Co.*, 609 F.2d 843, 858 (6th Cir.1979); *see also North Texas Producers Ass'n* v. *Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965) (upholding jury monopolization verdict against monopoly milk producers that refused to sell milk to dairy that sought to purchase milk from rival producers).

Second, and more generally, courts have held that *any* conduct (whether customer punishment or other conduct) qualifies as exclusionary if it fails the profit sacrifice test of *Aspen Skiing* and its progeny (including the recent *Trinko* decision).

In assessing whether the conduct at issue was unlawfully exclusionary or merely reflected legitimate, hard-nosed business practices, the Supreme Court in *Aspen Skiing* looked to see if the monopolist was "willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." 472 U.S. at 610-11; *see also Advanced Health-Care Servs.* v. *Radford Cmty. Hosp.*, 910 F.2d 139, 148 (4th Cir. 1990) ("if a plaintiff shows that a defendant has harmed consumers and competition by making a short-term sacrifice in order to further its exclusive, anti-competitive objectives, it has shown predation by that defendant").

Here, taking the Second Amended Complaint as true, BellSouth's conduct clearly "constitute[s] an abnormal response to market opportunities." *Instructional Sys. Dev. Corp.* v. *Aetna Cas. & Sur. Co.*, 817 F.2d 639, 649 (10th Cir. 1987). BellSouth is refusing to sell, *at full retail price*, DSL service *to existing customers* that would chose to deal with another company for a *different* service (local telephone). In other words, BellSouth would rather let valuable assets lay fallow than use them to provide highly profitable services to willing customers. This strategy can only be rational if it is anticompetitive – *i.e.*, if BellSouth's practice will prevent a sizeable percentage of those customers from actually switching to competitive carriers for voice services. Otherwise, all BellSouth has done is to stop providing an otherwise profitable service – indeed, a service that BellSouth claims to have invested billions of dollars to provide.

B. The District Court Applied Irrelevant Precedents In Dismissing The Second Amended Complaint.

Although the district court concluded that the Supreme Court's recent decision in *Trinko* compelled dismissal of the Amended Complaint, *see Levine*, 302 F. Supp. 2d at 1370-72, that decision in fact reinforces that dismissal was inappropriate. The district court appropriately recognized that the existence of federal regulation under the 1996 Act has no effect on claims based on "preexisting antitrust standards." But the district court improperly analyzed BellSouth's conduct as a "refusal to cooperate with rivals," applying a body of law that addresses whether the antitrust laws will ever require a monopolist to cooperate with rivals. The district court emphasized that the antitrust laws impose a duty to aid competitors "only in limited circumstances," and that, under *Aspen Skiing*, 472 U.S. 585, such liability should not be imposed unless two circumstances are present: "(1) the defendant's unilateral termination of a voluntary (and thus presumably profitable) course of dealing with its competitor and (2) the defendant's refusal to provide to the competitor its product for the retail price." *Levine*, 302 F. Supp. 2d at 1371. According to the district court, neither of those two factors is present in this case.

This case, however, does not concern an alleged refusal to deal with *competitors*. Instead, BellSouth stands accused of refusing to deal with its own *customers*. As *Lorain Journal* shows, refusals to deal with customers are analyzed differently than refusals to deal with rivals. The district court thus made a simple error: it relied on a line of authority that is simply not on point.

To be sure, BellSouth might need to provide DSL service over the same local loop used by the competitive carrier. But, contrary to BellSouth's claims below, *see* BellSouth Motion to Dismiss 14, 18 (Oct. 15, 2003), the limited "cooperation" necessary to implement such an arrangement (namely, the need for BellSouth to secure the competitive carrier's consent to use the high-frequency portion of the loop) is not remotely the type of "assistance" that was at issue in the refusal-to-deal cases relied upon by the district court. *Cf.*, *e.g.*, *Aspen Skiing*, 472 U.S. at 593-94 (plaintiff alleging rival ski slope had duty to participate in "all mountain" ski offering); *Trinko*, 124 S. Ct. at 877 (plaintiff alleging rival had duty to lease rivals access to local network facilities). Plaintiff is merely demanding that BellSouth continue to provide DSL service that it was previously providing under terms and conditions that were presumably profitable to BellSouth. BellSouth is not being asked to provide competitive carriers with the facilities and equipment so that they could offer their own DSL services. Rather, BellSouth would retain full ownership of its DSL facilities, retain its own customer relationship with the Plaintiff and be fully responsible for the DSL service it offers. Plaintiff's preferred voice carrier would have no say over the terms of BellSouth's DSL service.

Below, BellSouth suggested that it was indirectly being required to "deal" with rivals because the only way that it could continue to provide DSL service to the customer is by using the high-frequency portion of the loop that it leases to the competitive carrier that provides voice service. BellSouth Motion to Dismiss at 7-8. But, as Plaintiff alleges, BellSouth has in fact chosen to comply with a Florida state commission order requiring it to continue to provide DSL service to competitors' voice customers by providing the DSL service over an entirely *separate* loop that also serves the customer's location.[10] Second Am. Compl. ¶ 22. In other words, rather than using the high frequency portion of the loop that is leased to its competitor, BellSouth has chosen to use a different loop to provision the DSL service.

But even if this could be viewed as a "refusal to deal" case, *Trinko* reinforces that the Second Amended Complaint states a valid Sherman Act claim. As *Trinko* makes clear, where a monopolist's refusal to deal with a rival can only be rational because it cripples competition, that refusal to deal is unlawful. Specifically, in reviewing the refusal to deal at issue in *Aspen Skiing*, the *Trinko* Court noted that,

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[10] In virtually all cases, residential and small business locations are connected to (continued . . .)

"[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing [at issue in *Aspen Skiing*] suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko*, 124 S. Ct. at 880. The *Trinko* court further noted that in *Aspen Skiing* "the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent." *Id.* So too here: as in *Aspen Skiing*, "the defendant [is] already in the business of providing a service to certain customers . . . and refuse[s] to provide the same service to certain other customers." *Id.* (citing *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 370-71 (1973)).

The district court attempted to distinguish *Trinko* and *Aspen Skiing* on the ground that BellSouth had never offered DSL on a "standalone" basis such that customers could buy a competitive carrier's voice service and BellSouth DSL. *Levine*, 302 F. Supp. 2d at 1371-72. Thus, the district court reasoned that, in the absence of such a "voluntary" offering, there could be no presumption that BellSouth's refusal to provide such service now cannot be construed as "sacrificing" short-term profit for harm to competition. *Id.* This analysis is both factually and legally flawed.

(. . . continued)
multiple loops.

It is factually flawed because BellSouth, in fact, does offer DSL service to customers that purchase a competitive carrier's voice service when the competitive carrier provides that service via "resale" of BellSouth's service pursuant to section 251(c)(4) of the 1996 Act. *See* BellSouth Reply, WC Docket 03-251, at 37 n.31 (Feb. 20, 2004). And, to the best of *Amici*'s knowledge, the terms and conditions of that DSL service are identical to what BellSouth charges its own voice customers. What BellSouth will not do is provide DSL service to customers who purchase voice service from competitive carriers that provide that service over unbundled network elements ("UNEs") leased from BellSouth pursuant to section 251(c)(3) of the 1996 Act. BellSouth Motion to Dismiss 4 (describing its policy as applying only to local loop UNEs that have been leased pursuant to section 251(c)(3)).

This stark difference cannot be explained on the basis of any engineering differences: the same physical loop facilities are used to provide service to the customer whether the competitive carrier provides voice service using UNEs or through the resale of BellSouth's voice service.[11] Rather, the difference in treatment

[11] BellSouth contends that this difference in treatment results because when a carrier leases the loop as a UNE it effectively "owns" the loop and BellSouth has no "right" to provide DSL. *See* BellSouth Motion to Dismiss 3. The Second Amended Complaint, however, specifically alleges that this assertion is contrived. Second Am. Compl. ¶¶ 15-21; *see id.* ¶ 15 ("every [competitive carrier] doing business in the nine states in which BellSouth is the ILEC is willing to allow BellSouth to provide DSL services over its leased loops").

confirms that it is profitable for BellSouth to provide DSL to customers that have chosen another provider for voice service and that the real motivation behind BellSouth's unwillingness to provide DSL service to customers of competitive carriers that are served via UNEs is the marketplace reality that this type of competition is a much greater threat to BellSouth's local monopolies. Carriers that purchase UNEs under section 251(c)(3) obtain them at "cost," *see* 47 U.S.C. § 252(d)(1), and leasing UNEs is the principal means by which competitive carriers obtain access to bottleneck incumbent facilities. Competitive carriers can combine UNEs with their own equipment and provide customers with innovative service offerings.

On the other hand, carriers that utilize resale under section 251(c)(4) purchase at wholesale BellSouth's retail voice service at a price that is equal to BellSouth's existing retail price minus the costs that BellSouth avoids in selling at wholesale. However, because state commissions have generally set only shallow resale discounts and because competitive carriers are locked into offering the precise features and options that BellSouth offers its customers, resale has generally not proven a viable vehicle for selling to the mass market. *See, e.g.*, *Georgia PSC Order*, No. 11901-U, at 9, 16-17; *Louisiana PSC Order*, Order R-26173, at 13.

The district court's analysis is legally flawed because, under *Trinko* and *Aspen Skiing*, the court is supposed to examine whether a monopolist's refusal to deal is obviously explained by a desire to harm competition as opposed to ordinary profit maximization. *Trinko*, 124 S. Ct. at 880. Discontinuance of a prior, profitable relationship with a rival is potentially one way of demonstrating with sufficient likelihood that antitrust scrutiny is warranted, but it is certainly not the only way. And here, the economic reality simply ignored by the district court is that BellSouth is unwilling to sell its DSL services to a willing customer *at any price* if that customer purchases voice service from a competitive carrier that uses UNEs. "[T]here is *no* profit margin at which [BellSouth] would offer FastAccess service [to competitive carrier customers] and . . . it would rather lose the customer than provide FastAccess." *Florida PSC Staff Recommendation*, No. 020507-TL, at 24 (emphasis added). This strategy can only be rational if it is anticompetitive – *i.e.*, if BellSouth's practice will prevent a sizeable percentage of those customers from actually switching to competitive carriers for voice services.

C. The FCC Could Not And Did Not Hold That BellSouth's Conduct Was Lawful Under Section 2 Of The Sherman Act.

Nor is the district court correct that antitrust liability would be inconsistent with the FCC's findings in the *Triennial Review Order*, 18 FCC Rcd. 16978 (2003). *Levine*, 302 F. Supp. 2d at 1371 ("Because the FCC has already actively examined and affirmatively rejected the claimed competitive benefits of imposing, as a regulatory duty, the obligation that Plaintiff seeks to impose under the antitrust laws, no further antitrust scrutiny is warranted."). Even if the factual premise of the district court's analysis were correct, its conclusion would not follow. The federal courts and juries, not the FCC, have the ultimate responsibility to determine the scope of the Sherman Act. *See Allied Signal, Inc.* v. *B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999); *Nagel* v. *ADM Investor Servs., Inc.*, 65 F. Supp. 2d 740, 754 (N.D. Ill 1999). Thus, the FCC itself has made clear that "nothing" in its rules implementing the 1996 Act "limit the ability of persons to seek relief under the antitrust laws." *Local Competition Order*, 11 FCC Rcd. 15499, ¶ 129 (1996).

For these reasons, even if the FCC had "affirmatively rejected" Plaintiff's claim that BellSouth's conduct here is anticompetitive, that would not be a basis for dismissing that claim. Rather, this issue must be determined by the district court, subject to the requirements of the Sherman Act and the Federal Rules of Civil Procedure. And here, as explained above, Plaintiff has clearly alleged facts that, if true, would allow the jury to find that BellSouth's decision to cease providing a profitable service was only rational because of its impact on competition and was, therefore, exclusionary and in violation of section 2 of the Sherman Act.

In all events, the district court badly mischaracterized the FCC's findings. First, contrary to the district court's claims, the FCC in the *Triennial Review* proceeding was not asked to impose "the obligation that Plaintiff [here] seeks to impose under the antitrust laws." *Levine*, 302 F. Supp. 2d at 1371. At issue in the

Triennial Review proceeding was whether the FCC should mandate that the incumbent carriers must lease as an unbundled network element the low-frequency portion of loops (thereby allowing these carriers to lease a portion of the loop to provide their own voice service when the incumbent provides DSL service over the high-frequency portion of the loop). *Triennial Review Order*, 18 FCC Rcd. 16978, ¶ 260 (2003). In reaching this conclusion, the FCC sought to determine whether competitive carriers are "impaired" without such access. 47 U.S.C. § 251(d)(2); *Triennial Review Order*, 18 FCC Rcd. 16978, ¶¶ 62-68 (2003). But as explained above, Plaintiff is not asking the court to create under the antitrust laws any new unbundled network element or to require BellSouth to provide the low frequency portion of its loops, or anything else, to competitive carriers on an unbundled basis. Rather, Plaintiff is merely asking for a ruling that BellSouth may not penalize local telephone *customers* that would like to exercise competitive choices.

That BellSouth's anticompetitive practices at issue were brought to the FCC's attention in the context of whether the low frequency part of the loop should be separately unbundled likewise does not mean that the FCC "affirmatively rejected" Plaintiff's claim that BellSouth's practice is anticompetitive. The FCC held merely that the existence of the practice was not enough to show that competitive carriers were "impaired" within the meaning of section 251(d)(2) so as to justify separate unbundling of the low frequency portion of the loop. *Id.* ¶ 270. The FCC did not say anything about the reasonableness or lawfulness of BellSouth's practices, much less the propriety of restrictions on those practices imposed by the antitrust laws. To the contrary, the FCC elsewhere in the *Triennial Review Order* emphasized that in determining whether "impairment" exists, it was not applying antitrust competition or market power analyses. *Id.* ¶¶ 109-110. And the FCC has expressly held open the question whether BellSouth's anticompetitive actions may violate the Communication Act's prohibition on unjust, unreasonable and discriminatory practices. *Line Sharing Reconsideration Order*, 16 FCC Rcd. 2101, ¶ 26 (2001) (if "AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with . . . the Act itself, we encourage AT&T to pursue enforcement action.").

CONCLUSION

The district court's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29 AND 32

Pursuant to Fed. R. App. P. 29 and 32, I, Ryan D. Nelson, an attorney with Sidley Austin Brown & Wood LLP and one of the attorneys responsible for the following brief, hereby certifies that the text of this Brief is double spaced, uses a 14-point, proportionately spaced typeface, and does not exceed 7,000 words. Relying upon the Microsoft Word word count feature, the word processing program used to prepare the brief, Rule 32(a)(7)(C), I certify that this brief contains 6,809 words.

By:

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Ryan D. Nelson

Dated: April 16, 2004

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25 and 31 and Eleventh Circuit Local Rule 31-3, I, Ryan D. Nelson, hereby certify that I have served two copies of this brief upon counsel for each party separately represented by causing them to be mailed to the following persons at the following addresses:

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